rity, the fifth share of the principal, with such interest as has actually been reaped by the trust from the testator's death till the term of payment.

There is one satisfactory feature in the disposal of this case, and that is, that none of the claimants suffer loss by the decision. This is a competition for a benefit under trust-distribution. It may be that every competitor does not get all he seeks, but each gets a share. No claimant is contending *de damno vitando;* none is called on to restore what has been already received; and none is made richer at the expense of another.

The other judges concurred.

Agent for Reclaimers—Wm. Mitchell, S.S.C.

Agents for Respondents—C. & A. S. Douglas, W.S., and Dalmahoy & Cowan, W.S.

Wednesday, December 4.

SECOND DIVISION.

RITCHIE *v.* ANDERSON.

March-Ditch— Title — Possession — Executor — Expenses. Circumstances in which *held* that a party had proved possession of a ditch for seven years under a sufficient title, and held entitled to the benefit of a possessory judgment. 2. Executor of the party deceased allowed to insist in the action with the view of relieving the executry estate of expenses.

This was an advocation from the Sheriff-court of Nairnshire. The action arose by a petition in the inferior Court, at the instance of Mrs Ritchie, liferent proprietrix of a small pendicle of ground adjoining the lands of the respondent, concluding that the respondent, who had filled up a ditch which divided the two properties, should be ordained to restore it to its former condition, the said ditch being alleged to be the march fence between the properties. In the petition, the petitioner described the ditch as having been a march fence for forty years, but in her condescendence it was stated that it had originally been formed out of the properties of the parties respectively, and that it was accordingly common property. It was also stated that march stones had been originally placed at the formation of the ditch in the centre of the ditch with the view of indicating the line of march between the properties. These latter statements were introduced into the revised condescendence at adjustment, and were objected to by the respondent in the discussion in the Supreme Court as incompetent. In addition to her averment of a march fence for forty years, the petitioner alleged possession of the ditch for seven years immediately prior to the date when the respondent filled up the ditch, and claimed the benefit of a possessory judgment. The respondent denied either that the ditch was ever a march fence or common property, and maintained that it had been made by his ancestor out of his own lands, and therefore belonged in property to him. In support of this contention, he relied mainly on the fact that from 1845, as seen from the plans produced, and from an earlier period, as spoken to by the witnesses, there had been a line of march stones *in situ* of the petitioner's pendicle, and on her side of the ditch, showing that the march stones, and not the ditch, were the boundary between the lands. The respondent further said that one of these march stones, at the south-east corner of the petitioner's land, had been removed after the raising of the action, and, that to suit this removal, the statement in the condescendence as to march stones being placed in the centre of the ditch had been incompetently made. The titles of the parties mentioned their lands as their respective boundaries, and made no mention whatever of a ditch. One of the plans produced was that of the burgh of Nairn, the common superior of both proprietors, and the respondent undertook to show that the line of march stones upon which he relied were traced in that plan, and in others which had been prepared long previous to the present dispute, in precisely the same direction, which placed the ditch in question entirely upon the lands of the respondent. The Sheriff-substitute allowed a proof of the parties' averments. The petitioner's proof consisted mainly of the evidence of the members of her own family, several of whom spoke to the period when she acquired her feu (1824), and said that the ditch was made about that time from land taken from each side. The possession of the ditch during the period required to found a possessory judgment was spoken to exclusively by two of the petitioner's sons, who were charged by the respondent as being either instrumental in or the parties who removed one of the march stones for the purposes of the action. The respondent, in his proof, endeavoured to show that the ditch had always been regarded as part of his property, and had been declared to be so by his predecessors. He also strongly relied on the position of the march stones, and on the removal of one of them in the interests of the petitioner. The Sheriff-substitute (Falconar) found that the averments of the petitioner were such as to entitle her to a possessory judgment, if proved, and that the proof was sufficient to establish them. The Sheriff (Bell) altered, holding that, even if the case could be treated as a possessory one, the evidence upon which possession was based was not credible. The respondent obtained decree for his taxed account of expenses.

The petitioner advocated. After the advocation was brought the petitioner died, and her executor was sisted to the process.

The Lord Ordinary (Ormidale), before whom the process first depended, recalled the interlocutor of the Sheriff, and returned to that of the Sheriff-substitute.

The respondent reclaimed.

D.-F. Moncrieff and W. A. Brown, for him, argued—The case, as originally laid in the petition, was one of march fence, and it was incompetently altered on adjustment by the introduction of the statement that the ditch was made by a portion of land taken from each property. There is no relevant allegation of common property, because it is distinctly said that stones were laid in the centre of the ditch to mark the boundary, and, if the ditch was common property there was a *pluris petitio* in the petition, for it prayed for a restoration of the whole ditch to its former condition. The petitioner's contention was excluded by her titles, for they contained no mention of a ditch as the boundary of her lands, and a possessory judgment could not be founded upon a title which did not clearly include the subject in dispute. Assuming the petitioner's case could be dealt with as a possessory one, her contention failed—(1) because she had not relevantly set forth possession of the ditch, the only statement being that she had possessed her pendicle and its pertinents; (2) because the possession proved was not the possession alleged, assuming there was a sufficient allegation; (3) be-

cause the possessory period fell short of three months; (4) because the evidence of possession depended exclusively on the testimony of two men, the sons of the petitioner, who were utterly unreliable, they having caused the removal of the march stone, and their evidence being in itself contradictory.

CLARK and GEBBIE in answer—The case does not, as contended for by the respondent, depend entirely upon two witnesses. It is competent, dealing with the question as a possessory one, to go beyond the period required to set up the case, and to look to the original formation of the ditch. Upon that point it is proved by evidence which has not been impeached on any other ground than its unreliability, as being given by relatives of the petitioner, that the ditch was originally made by ground taken from both properties. It is not necessary to prove continuous possession, year by year, during the possessory period. If acts of possession are found to have taken place continuously during the period, that will be sufficient.

The Court adhered to the interlocutor of the Lord Ordinary, accepting as worthy of belief the evidence given by the petitioner's daughters as to the formation of the ditch, and holding that the formation of the ditch and its history were to be taken into account in construing the subsequent possession, and that it was not necessary that there should be no interruption for any time during the possessory period, but that possession was sufficiently established if acts of possession were done during the requisite period. There was some suspicion, certainly, attachable to the petitioner's sons in the removal of the stones, but that was not sufficient to invalidate their evidence as to the possession of the ditch.

Agents for Advocator—Macgregor & Barclay, S.S.C.

Agents for Respondent—Scott, Moncrieff, & Dalgetty, W.S.

COURT OF TEINDS.

Wednesday, December 4.

MINISTER OF LOGIE *v.* HERITORS.

Teinds—Augmentation—Communion Elements. £12 granted for communion elements, the population of the parish being 4000.

The minister of Logie, with a present stipend of 18 chalders, obtained, of consent, an augmentation of 3 chalders.

DUNCAN, for him, asked a sum of £15 for communion elements, the population of the parish being close upon 4000; and it being the practice of the Court, he stated, to grant an allowance of £15 when the population was between 3000 and 5000.

The heritors neither consented nor opposed.

The Court granted £12.

Agents for Minister—Adamson & Gulland, W.S.

Wednesday, December 4.

MINISTER OF KILMORACK *v.* HERITORS.

Teinds—Augmentation—Valuation. An objection being stated in an augmentation that the teinds were exhausted, the precedent of *Kilbirnie* followed, and procedure sisted to allow minister to bring a declarator.

The minister of Kilmorack asked an augmentation.

CLARK, for heritors, objected, on the ground that there was no free teind. The teinds had been exhausted since 1816, and the proper course to follow was that adopted in the case of *Kilbirnie*, 18th December 1866, where procedure was sisted in order that the minister might bring a declarator.

WATSON, for the minister, contended that this was not a question as to the validity of the decrees of valuation, but merely as to their extent, as in the *Banchory-Devenick* case.

The Court followed the case of *Kilbirnie*, and sisted procedure.

Agents for Minister—M'Ewen & Carment, W.S.

Agents for Heritors—Gibson-Craig, Dalziel, & Brodies, W.S.

COURT OF SESSION.

Thursday, December 5.

FIRST DIVISION.

A. *v.* B.

Diligence—Inhibition—Small Debt Act—Debts Recovery Act. Held that inhibition was incompetent on a decree under the Small Debt Act, 1 Vict., c. 41, and therefore incompetent on a decree under the Debts Recovery Act 1867, 30 and 31 Vict., c. 96.

This was a bill for letters of inhibition on a decree and charge under the Debts Recovery Act 1867, 30 and 31 Vict., c. 96.

LORD MURE doubted the competency of the application, and therefore reported to the Court.

PATTISON for the petitioner.

The Court took time to consider their judgment.

At advising,

LORD PRESIDENT—This bill sets out that the complainer, on 10th November 1861, raised an action against the defender before the Sheriff of Dumfries to recover payment of £17, 14s. 3d., being the amount of an account; and in that action, he says, he obtained decree on 22d November for payment of the amount, with expenses; and, on 22d November, he caused an officer of court to give a charge to the defender for payment on that decree, and he now asks letters of inhibition on this decree and charge. The question is, Whether a decree obtained under the Debts Recovery Act 1867, and a charge on that decree, can be a warrant for letters of inhibition? but that depends, in the first instance, on whether letters of inhibition could competently issue on a decree obtained under the Small Debt Act, 7 Will. IV., and 1 Vict., c.

As regards decrees obtained under the former Act—the Small Debt Act—the Court are of opinion that letters of inhibition cannot competently proceed on such decree, and that the practice which has hitherto prevailed, of refusing to issue such letters, is correct. That statute provides expressly every right that the pursuer of a small debt action is to have in virtue of the statute and decree. The form of summons, the manner in which it is dealt with, the procedure in the action, the form of decree, are all provided expressly; and, in particular, it is provided that, on the extract decree, execution